FILED
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 921.

W. FRANK LEE, JR., as Administrator of the Estates of W. FRANK LEE, deceased, and ANNE H. LEE, surviving wife, now deceased,

Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF

RICHARD STEEL,
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W. FRANK LEE, JR., as Administrator of the Estates of W. FRANK LEE, deceased, and ANNE H. LEE, surviving wife, now deceased,

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Although petitioner disagrees with respondent's characterization of the facts, the Court will not be burdened with an analysis of the evidence. For the purposes of this application, we respectfully refer to the opinion of Circuit Judge Cameron below which indicates the lack of factual merit to respondent's argument. 227 Fed 2d 181, 184-187 (see Appendix B). Curiously, the respondent overlooks certain basic questions of law which are substantial and the answers to which are fundamental to the future security of decedent's estates.

I.

May a deficiency be assessed against a deceased taxpayer by means of the net worth reconstruction method? Respondent suggests that the use of this procedure is merely the adaptation of circumstantial evidence, as permitted by Section 41, I. R. C. (1939). However, with the taxpayer deceased and unable to explain the sources of net worth increase, a basic principle of circumstantial evi-

dence has been violated, viz., an inference must be drawn from a fact, not from another inference. In *United States* v. *Ross,* 92 U. S. 281 (1875), Mr. Justice Strong of this Court wrote at page 284:

> "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed."

See also:

Westland Oil Co. v. *Firestone Tire and Rubber Co.,* 143 F. 2d 326 (C. A. 8th, 1944);
Standard Accident Insurance Co. v. *Nicholas,* 146 F. 2d 376 (C. A. 5, 1944).

II.

Respondent argues that fraud may be established solely by proof of substantial understatement of income created by the net worth reconstruction method without affirmative evidence of fraudulent intent. However, such understatement may result by reason of the inability of the petitioner to overcome the presumption that the deficiency report is *prima facie* correct. *Snell Isle, Inc.* v. *Commissioner,* 90 F. 2d 481, cert. denied, 302 U. S. 734 (1937). If respondent arguments are sound, then the statutory burden imposed upon the respondent under 26 U. S. C. 1952 ed., Sec. 1112 becomes a nullity.

III.

Fraud penalties abate with the death of a taxpayer.

Respondent argues that as this Court determined in *Helvering* v. *Mitchell,* 303 U. S. 391 (1938), that income tax civil penalties were remedial, they no longer abate. The abatement of civil income tax penalties has never

been before this Court. In *Sullivan* v. *Associated Billposters and Distributors,* 6 F. 2d 1000, 1009 (C. A. 2nd, 1925), the Court wrote:

> "Is the fact that the statute is remedial and not penal sufficient in itself to make the cause of action survive? We do not think it is. It is undoubted that under remedial statutes, which give a cause of action which otherwise would not exist, it has been held that the cause of action survived. But those cases seem to be cases in which the right to recover can be asserted in an action of contract * * *.
>
> "Causes of action under remedial statutes, to recover for torts, abate according to the established rules of the common law the same as ordinary common law actions, unless they are saved by a statutory provision." (p. 1010)

Never previously has any action which abated under the common law been revived except by an act of the legislature. Admittedly, no statutory provision here exists.

Assuming, *arguendo,* that a tax penalty survives and may be assessed after the death of a taxpayer without statutory directive, the respondent ignores the fact that the maximum amount which might be collected would be a sum commensurate with the loss sustained. Admittedly, no relationship exists between the fraud penalties assessed at bar, viz., $24,328.76, and any loss by the Commissioner of Internal Revenue might have sustained. Under the common law, therefore, any such penalty would constitute a "corruption of the blood". Unless the actual damages sustained by the respondent were proved the assessment of an arbitrary penalty against a decedent's estate would appear to be in violation of Title 18 U. S. C., Sec. 3563.*

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*"No conviction or judgment shall work corruption of blood or any forfeiture of estate."

Conclusion

The points raised by the petition are primarily legal, not factual. They have not previously been determined by this Court. They are substantial and of general importance in that the estates of deceased taxpayers are imperiled unless the actions of the Commissioner of Internal Revenue in assessing deficiencies against such estates are limited to a strict construction of Section 41 of the I. R. C. (1939); and that the assessment of fraud penalties against decedents be barred until such time as the Congress by appropriate legislative enactment directs otherwise.

Respectfully submitted,

RICHARD STEEL,
Counsel for Petitioner,

W. FRANK LEE, JR.,
As Administrator of the Estates of W. Frank Lee and Anne H. Lee, both deceased.

Dated: New York, N. Y., June 1, 1956.

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HAROLD B. WILLEY, C

United States Court of Appeals

FIFTH CIRCUIT

No. 15,512

W. FRANK LEE, JR., as Administrator of the Estate of W. FRANK LEE, Deceased, and ANNE H. LEE, surviving wife,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

PETITION FOR REVIEW OF DECISIONS OF THE TAX COURT OF THE UNITED STATES (DISTRICT OF GEORGIA).

PETITION FOR REHEARING

U. S. COURT OF APPEALS
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